Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF FAIRFAX COUNTY VIRGINIA IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

Fairfax County herein replies to comments filed in the above captioned proceeding in response to issues raised by the Commission in the *Further Notice.* The *Further Notice* proposes to extend the findings and regulations of the *Order* in this proceeding from new applicants to incumbent providers. The County agrees with cornmentors that the record upon which the *Order* was based fails to show that the local franchising process has created barriers to entry for competitive providers. This scant record offers no basis to extend the *Order's* findings to incumbents. By now extending the *Order's* findings through the *Further Notice,* the arbitrary and capricious effect of the *Order* will be compounded, not corrected.

Comments suggesting that I-Net capital cost provisions in franchise agreements should count towards the franchise fee cap contradict federal law. I-Nets are educational and governmental access facilities, the capital costs of which are not franchise fees. The Commission acknowledged in the *Order* that federal law explicitly provides that franchising authorities and cable operators may agree to customer service requirements. The renewal of a franchise may be assessed on the basis of (1) whether the cable operator has substantially complied with those franchise terms and (2) whether the quality of the operator's service and response to customer complaints and billing practices has been reasonable in light of community needs. Local customer service compliance data is necessary to enforce local customer service requirements. The attempt by at least one commentor to suggest that national compliance reporting should be an acceptable substitute for local customer service compliance reporting would frustrate the intent of Congress to permit local franchising authorities to ensure that cable operators are being responsive to local customer service complaints. Fairfax County encourages the Commission to continue to recognize the important public interests served by agreed upon local customer service requirements and compliance reporting.

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I. INTRODUCTION.

Fairfax County, Virginia ("Fairfax County" or the "County") submits the following reply comments in response to comments filed in the proceeding, *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 [06-180] (rel. March 5, 2007) *("Further Notice,"* "*FNPRM*," or *"Order").* In the *Order,* the Commission relied upon scant, dated, and anecdotal evidence to arbitrarily and capriciously grant competitive advantages to new entrants. As discussed by the County in its *Further Notice* comments, regulation, whether local or federal, should not unreasonably prejudice or disadvantage any cable operator, nor should it unreasonably prejudice or disadvantage local franchising authorities. It is unreasonable to indiscriminately limit the franchise negotiation period without providing any guidance whatsoever as to the negotiation resources competitive applicants would be reasonably expected to devote to the franchising process. Furthermore, limiting the ability of local franchising

authorities to require reasonable build-out provisions increases the likelihood that competitive cable and broadband service will not reach all neighborhoods.

The regulatory prejudices and disadvantages that the *Order* creates will not be corrected by now attempting to extend through the *Further Notice*, the *Order's* provisions to reach incumbent cable operators as well as new applicants. Fairfax County agrees with comments filed in this proceeding that the new public, educational, and governmental access facilities requirements contained in the *Order* are contrary to federal law.[1] Furthermore, comments suggesting that I-Net capital cost provisions in franchise agreements should be counted towards the franchise fee cap would contradict federal law. I-Nets are educational and governmental access facilities, the capital costs of which are not franchise fees.

Finally, in the *Order* the Commission concluded that federal law explicitly provides that franchising authorities and cable operators may agree to customer service requirements.[2] Fairfax County agrees with other comments filed in this proceeding that the renewal of a franchise is governed by 47 U.S.C. § 546, not 47 U.S.C. § 541(1)(a)(1).[3] Under 47 U.S.C. § 546, the renewal of a franchise may be assessed on the basis of (1) whether the cable operator has substantially complied with those franchise terms and (2) whether the quality of the operator's service and response to customer complaints and billing practices has been reasonable in light of community needs. The Commission should continue to reject the suggestion made by other commentors

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[1] *National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy Further Notice Comments* at 11 *("NATOA Further Notice Comments").*

[2] *Order* at ¶ 143.

[3] *See e.g.*, *NATOA Further Notice Comments* at ii, 4-5; *Greater Metro Telecommunications Consortium, the City of Colorado Springs, Colorado, and the City of Tacoma, Washington*

that, federal law not withstanding, the Commission should narrowly construe what are permissible customer service provisions or reporting requirements.

II. THE RECORD OFFERS NO BASIS TO EXTEND THE *ORDER* TO INCUMBENT PROVIDERS AND TO DO SO WOULD CONTRAVENE FEDERAL LAW.

Fairfax County has consistently sought to encourage competition for cable programming services, and the County has recognized the inherent differences between new and existing cable operators without adopting cable regulation and franchise agreements that would unreasonably prejudice or disadvantage any cable operator.[4] The County agrees with commentors that the record fails to show that the local franchising process has created barriers to entry for competitive providers.[5]

Fairfax County agrees with the comments of Time Warner that "the record evidence fails to show that such oversight [of the local franchising process by local franchising authorities] has created barriers to entry for competitive providers."[6] Fairfax County also agrees with Commissioners Adelstein and Copps that the record "provides scant, dated, isolated, and unverified examples,"[7] and "fail[s] to rise beyond isolated episodes or anecdotal evidence."* In

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Further Notice Comments at *3; Sacramento Metropolitan Cable Television Commission Further Notice Comments* at *2;* and *Mt. Hood Cable Regulatory Commission* at *2.*

[4] *See Fairfax County Comments* at 8.

[5] *Time Warner Further Notice Comments* at i; *Towns and Cities of Abington, Belchertown, Brockton, Brookline, Canton, Dartmouth, Dedham, Easthampton, Groveland, Newton, Northborough, Northhampton, Southborough, Sudbury, Taunton, Westwood, Wilmington, Massachusetts, Towns of Amherst, Londonderry, and Windham, New Hampshire, and Access Centers Further Notice Comments* at 7 *("New England Communities Further Notice Comments"). See also National Cable Telecommunications Association Further Notice Comments* at *2-3 ("NCTA Further Notice Comments").*

[6] *Time Warner Further Notice Comments* at i. *See also NCTA Further Notice Comments* at *2-3.*

[7] Dissenting Statement of Commissioner Adelstein, *Order* at 99.

its reports to Congress regarding the state of competition for delivery of video programming and deployment of broadband services, the Cornmission has reported factual statistical data, such as the number of subscribers served by cable system operators, operating cash flow per cable subscriber, and the number of competitive providers of broadband services available by type, state, and even zip code.' Yet, in this proceeding, no such similar data regarding the state of competitive cable franchising was reported, or apparently relied upon, by the Commission. Widely available industry analysis regarding the financial viability of and progress made by telephone companies as they enter franchised video service markets was absent from the *Order*. Specific examples of competitive cable franchises granted by Fairfax County and others were largely ignored." And on balance, the Commission seemingly relied on the basis of five specific examples submitted on behalf of four providers, and unconfirmed allegations submitted by four new entrants and their trade association, to reach its conclusions.'[1] The *Further Notice* is founded upon an *Order* which among other things, relied upon scant, dated, and anecdotal evidence, and the Commission therefore would have an even less developed record to use as the basis to extend the *Order* to reach incumbent cable operators.

Moreover, the Commission's stated purpose in adopting the findings and regulations of the *Order* was to enable new cable entrants to compete more effectively with "entrenched cable

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[8] Dissenting Statement of Commissioner Copps, *Order* at 94.

[9] *See e.g., In re Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming),* Twelfth Report [2005 Report, FCC 06-11](rel. Mar. 3, 2006), at Table 2 and ¶ 43 ("2005 *Video Programming Report");* Federal Communications Commission, *High-speed Service for Internet Access:* Status as of June 30,2006 (Jan. 2007) at Tables 8-14 *(June 30, 2006 High Speed Internet Access Service Status Report);* Federal Communications Commission, *Number of Holding Companies Reporting High-speed Subscribers by Zip Code as of June 30, 2006* (Feb. 2007).

[10] *See Order* at ¶ 20.

[11] *See* Dissenting Statement of Commissioner Adelstein, *Order* at 99-100.

operators."[12] Though this rationale cannot be applied to incumbents, in the *Further Notice,* the Commission nonetheless tentatively concluded that the *Order's* findings should be extended to incumbents at renewal. The Commission has reported to Congress that the top five cable operators collectively control seventy-three percent of the cable services market.[13] The Commission also has failed to provide for the possibility that a franchise may come up for renewal without any competitive entrant having entered the market. Thus, the entrenched incumbent provider could become the sole beneficiary of a federal regulatory structure ostensibly adopted to facilitate competitive entry.

The County also urges the Commission to resist calls to void bargained-for and agreed-to provisions in existing franchise agreements as suggested by Charter.[14] The Commission should also reject suggestions to accomplish the same by misapplying a "fresh look" doctrine as suggested by RCN,[15] by distorting the application of "commercially impracticable" as suggested by Alcatel-Lucent and the FTTH Council,[16] or by reinterpreting what are permissible categories of "customer service" as suggested by Verizon.[17] To alter bargained-for and agreed-to provisions in existing franchise agreements would both be unlawful, as noted by NATOA in its

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[12] *Order* at ¶ 88.

[13] *2005 Video Programming Report* at Table *2* and Appendix B, Table B-1.

[14] *See Charter Further Notice Comments* at 5. Charter asks the Commission not to wait for renewal, but to go further and extend the findings of the *Order* to preempt provisions of current franchises.

[15] *RCN Further Notice Comments* at *2*.

[16] *Alcatel-Lucent Further Notice Comments* at 7; *FTTH Council Further Notice Comments* at *7*. *See also Verizon Further Notice Comments* at 11. 47 U.S.C. § 545(a)(1) states that a "cable operator may obtain from the franchising authority modifications" of the franchise requirements if "(A) in the case of any such requirements for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with the requirement...."

[17] *Verizon Further Notice Comments* at 4.

comments," and inconsistent with the Commission's stated purpose in adopting the *Order* to facilitate award of new competitive franchises. Moreover, franchise agreements are negotiated compromises. It would be unreasonable and serve no public purpose to allow franchisees to cherry pick and void certain conditions in favor of new terms without allowing the other party – *i.e.*, the local franchising authority – to do the same.[19] The County also notes that these suggestions are contrary to the Virginia reciprocity statute, which while permitting existing entrants to obtain the same terms and conditions as granted to new entrants, requires that the existing cable operator "accept all applicable terms and conditions only in their entirety and in lieu of its existing franchise document and without the ability to accept specific terms and conditions."[20]

The County does, however, agree with comments of Charter that "[c]reating regulatory winners and losers through differential application of statutory standards will not promote competition or service consumers."[21] The *Order* is "limited [in applicability] to competitive applicants."[22] Thus, franchise terms and conditions contained in already-awarded competitive

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[18] *See NATOA Further Notice Comments* at 10-13.

[19] Furthermore, the Commission has rejected a "pick and choose" approach in other contexts. The Commission initially promulgated a "pick and choose" rule in 1996 to permit competitive local exchange carriers to selectively choose among negotiated provisions of carrier-to-carrier interconnection agreements. After its decision was upheld by the U.S. Supreme Court in *AT&T Corp. et al. v Iowa Utilities Board et al.*, 525 U.S. 366 (1999), however, the Commission changed course. In August 2003, the Commission issued a Notice of Proposed Rulemaking in which it tentatively concluded that the pick-and-choose rule "discourages give-and-take bargaining." Second Report and Order, *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, 19 FCC Rcd 13494, 13496, ¶ 3 (2004). The Commission subsequently promulgated its "all or nothing" rule, effective August 2004, under which a CLEC interested in adopting a term or service of an existing agreement must opt in to the entire agreement. See *Id.* at 13494, ¶ 1.

[20] Va. Code Ann. § 15.2-2108.26 (2006) (emphasis added).

[21] *Charter Further Notice Comments* at 11.

[22] *Order* at ¶ 139.

franchises would be barred in future franchises granted by neighboring localities to the same competitive entrant on the basis that such terms and conditions amount to unreasonable refusals to award competitive franchises. The *Order* creates a regulatory environment in which actions taken by local franchising authorities in one state will be *per se* reasonable, while those same actions taken in another state will be *per se* unreasonable barriers to entry.[23] Finally, the Commission expressly limited the findings and regulations of the *Order* to states that have "not circumscribed the LFA's authority" and then lists Virginia as an example of a state that has "establish[ed] a comprehensive set of statewide parameters that cabin the discretion of LFAs.[24] Nonetheless, at least one competitive entrant has mistakenly concluded that the new regulation established by the *Order*, 47 C.F.R. § 76.41, applies in Fairfax County, Virginia.[25]

III. INSTITUTIONAL NETWORKS ARE EDUCATIONAL AND GOVERNMENTAL ACCESS FACILITIES.

Time Warner's contention that franchise requirements to construct I-Nets are "in-kind payments unrelated to the provision of cable service that count towards the franchise fee cap" is both legally and factually incorrect.[26] Under federal law, "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access

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[23] *Order* at footnote *2*. For example, franchise negotiations concluded within three hundred and sixty-five days in Massachusetts are *per se* reasonable, while negotiations with the same provider in Rhode Island that take longer than ninety days would be deemed to have created a barrier to entry.

[24] *Order* at footnote 2, *citing* Va. Code Ann. §§ 15.2-2108.19 *et seq.*

[25] Letter from Craig H. Pizer, Vice-president – Business Development, Cavalier TV and Telephone, to Anthony Griffin, County Executive, Fairfax County, Virginia (April 25,2007). "Cavalier Telephone, LLC ("Cavalier") respectfully submits the enclosed Cable Franchise Application for a cable television franchise in Fairfax County pursuant to 47 C.F.R. 76.41." *Available upon request.*

[26] *Time Warner Further Notice Comments* at footnote 19.

facilities," are not franchise fees.[27] Federal law defines "public, educational, or governmental access facilities" as "(A) channel capacity designed for public, educational, or governmental use; and (B) facilities and equipment for the use of such channels."[28] Accordingly, as discussed below, I-Nets are educational and governmental access facilities.

The County further notes that the Commission's statement in the *Order* that "we clarify that any requests made by LFAs that are unrelated to the provision of cable services by a new entrant are subject to the statutory 5 percent franchise fee cap,"[29] is gross mischaracterization of federal law. I-Nets are educational and governmental access facilities, and federal law defines I-Nets as "communications networks... constructed or operated by the cable operator and which [are] not generally available only to subscribers who are residential subscribers."[30] "Cable service" is a defined term requiring "transmission to subscribers."[31] Thus, federal law anticipated that there will be educational and governmental uses that are not "cable services" and also provided that those capital costs related to "facilities and equipment" used to provide "channel capacity designed ... educational or governniental use," are not franchise fees.[32]

As a factual matter, however, I-Nets are educational and governmental access facilities that can be used to provide video programming not generally available to residential subscribers, as well as to facilitate the production and distribution of governmental and educational cable service programming over educational and governmental access channels. The Fairfax County I-Net is a secure ring of fiber optic infrastructure connecting public facilities, including

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[27] 47 U.S.C. § 542(g)(2)(C).

[28] 47 U.S.C. § 502(16).

[29] *Order* at ¶ 105.

[30] 47 U.S.C. §§ 531(b) and 521(f).

[31] 47 U.S.C. § 602(6)(A).

municipal buildings, police and fire stations, courts and jails, and schools and libraries. The County's largest cable provider is transmitting programming generally available to cable subscribers to the County's I-Net video headend. At the County's I-Net video headend, up to fifteen closed channels programmed by Fairfax County Public Schools and Fairfax County Government will be inserted. In this manner, the I-Net will deliver cable service programming, as well as proprietary closed channel video programming – *e.g.*, the Fairfax County Public Schools' Teacher Training Network and the Fairfax County Training Network – to public schools and public buildings.

In addition, the Fairfax County I-Net is designed to facilitate remote transmission of video programming.[33] Each I-Net site will be capable of providing a video feed back to the County I-Net video headend which can then be transmitted via the County's government or educational access channels to all cable subscribers within the County. For example, if the current President of the United States or a NASA astronaut makes a visit to a local school, live or recorded video of that event can be transmitted back to the Fairfax County Government Center Building via the County I-Net and then transmitted to all cable subscribers within the County as video programming on Fairfax County Government Channel 16. In this manner, Fairfax County would be using its I-Net to transmit video programming to subscribers.

As the preceding paragraphs illustrate, I-Nets are "educational or governmental access facilities,'' *i.e*, "channel capacity designated for … educational or governmental use" and "the

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[32] 47 U.S.C. §§ 602(16) and 542(g)(2)(C).

[33] Video programming is defined in 47 U.S.C. § 602(20) as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."

facilities and equipment for the use of such channel capacity."[34] As such, capital costs required by the franchise to be incurred by cable operators to support I-Nets are not franchise fees.[35]

IV. LOCAL CUSTOMER SERVICE STANDARDS BENEFIT CONSUMERS.

Fairfax County agrees with the Commission's conclusion that given the explicit statutory language, "we cannot preempt state or local customer service laws that exceed the Commission's standards."[36] Customer service regulations ensure that consumers receive the service they pay for and an appropriate level of responsiveness to their service complaints. Federal law explicitly provides that franchising authorities and cable operators may agree to customer service requirements, and that the renewal of a franchise may be assessed on the basis of whether the cable operator "has substantially complied with the material terms of the existing franchise" and whether "the quality of the operator's service, including signal quality, response to customer complaints, and billing practices ... has been reasonable in light of community needs."[37] We agree with the comments of the New York State Department of Public Service, that whether a cable operator's service quality and responsiveness to customer complaints has met community needs can only be determined if the cable operator provides some verifiable report as to the service and responsiveness that it provided to *that* community.[38] AT&T's suggestion that it should be able to demonstrate compliance with "customer service standards based on aggregate performance data" would eviscerate the statutory obligation to assess responsiveness to community needs and interests. AT&T's comments regarding customer service are a thinly-

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[34] 47 U.S.C. § 602(16).

[35] 47 U.S.C. § 542(g)(2)(C).

[36] *Order* at ¶ 143.

[37] 47 U.S.C. §§ 546(c)(1)(A) and 546(c)(1)(B) (emphasis added).

veiled attempt to achieve through regulation what it could not achieve through legislation – *i.e.*, a national franchise. Local customer service standards are specifically permitted by federal law and are an important means of ensuring responsiveness to customer complaints.[39] The County agrees with the City of Boston that customer service requirements in local franchises provide local franchising authorities "with the means to address local customer service issues and appropriately oversee the operations of cable service providers in the interests of local residents."[40]

Significant numbers of service quality and billing complaints continue to occur in competitive markets. Head-to-head competition in Fairfax County has not eliminated cable service complaints.[41] In addition, comments filed by New England communities noted that their communities "continue to experience cable customer service complaints even where there is head-to-head competition between franchised cable operators."[42] And as the Commission itself has experienced, competition in market for wireline and wireless telephone services has not eliminated customer service complaints. For example, in 2005, the Commission received more than seventeen thousand billing and service quality complaints related to wireless service, and nearly sixteen thousand wireline telephone billing and service quality complaints.

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[38] *See New York State Department of Public Service Further Notice Comments* at *3*.

[39] 47 U.S.C. § 552(d): "(1) Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title; (2) Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b)."

[40] *City of Boston Further Notice Comments* at 4.

[41] In 2006 the Fairfax County Department of Cable Communications and Consumer Protection helped consumers resolve over three hundred cable service complaints.

[42] *New England Communities Further Notice Comments* at 8.

Finally, Fairfax County rejects Verizon's implication that state or local customer service regulations "threaten federal broadband policies."[43] Cable service – and thus broadband cable modem service – currently is available to 108.6 million homes or 98.7% of homes with a television,[44] and 93% of residential end user premises have access to cable modem service.[45] Local cable customer service regulation has not threatened cable modem broadband deployment.

V. CONCLUSION.

The isolated episodes or anecdotal evidence upon which the *Order* relied to establish new regulations for new applicants provides no basis to extend the *Order* to incumbents. I-Nets are educational and governmental access facilities. Capital costs required by the franchise to be incurred by cable operators to support I-Nets are not franchise fees. Local customer service standards are specifically authorized by federal law, have not impeded broadband deployment, and are an important means of ensuring responsiveness to customer complaints. The

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[43] *See Verizon Further Notice Comments* at *8*.

[44] *2005 Video Programming Report* at n.30 and ¶ 30.

[45] *June* 30, *2006 High Speed Internet Access Service Status Report* at Table 14.

Commission is right to continue to reject arguments that such local customer service standards cannot be separately negotiated or reasonably enforced.

Respectfully submitted,

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